[No. B056556. Second Dist., Div. Two. Feb. 6, 1992.]

PASADENA UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. STATE BOARD OF EDUCATION, Defendant and Respondent; JOHN MUSSER, Real Party in Interest and Respondent.

[**Reprinted without change to permit tracking pending disposition on review by the Supreme Court** (See Preface to Cumulative Subsequent History Table. Previous cite 3 Cal.App.4th 455.)]

OPINION

GATES, Acting P.J.--In the instant proceeding Pasadena Unified School District challenged the decisions of respondent State Board of Education (State Board) (1) approving a transfer of territory from Pasadena Unified School District to San Marino Unified School District; and (2) directing that the proposal be submitted for approval in an election limited exclusively to the residents of the territory wishing to be transferred. When its petition for writ of mandate was denied, this appeal followed. Three assignments of error are made:

"I. Respondent abused its discretion in granting a rehearsing on the same petition it previously denied. II. Respondent's decision to approve the transfer is contrary to law, arbitrary, capricious, and entirely lacking in evidentiary support. A. Approval of the petition to transfer will promote racial and ethnic segregation in the Pasadena Unified School District. B. Approval of the petition to transfer would result in a significant financial fain to the petitioning homeowners. III. Limitation of the election to the voters in the are proposed for transfer is a violation of equal protection guarantees."

The parties agree that in reviewing the State Board's approval of the petition for transfer, this court is limited to determining from an examination of the proceedings before the agency whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. (Pitt v. Perluss (1962) 58 Cal.2d 824, 833 [27 Cal.Rptr. 19, 377 P.2d 83].)

Section 35753 of the Education Code, in effect at the time, required that the reorganization in issue substantially meet the following conditions: "(1) That the new districts will be adequate in terms of number of pupils enrolled. [¶] (2) That the districts are each organized on the basis of a substantial community identity. [¶] (3) That the proposal will result in an equitable division of property and facilities of the original district or districts. [¶] (4) That the reorganization of the districts will not promote racial or ethnic discrimination or segregation. [¶] (5) The proposed reorganization will not result in any substantial increase in costs to the state. [¶] (7) Such other criteria as the board may, by regulation, prescribe." (Ed. Code, § 35753, subd. (a) (Stats. 1980, ch. 1192, § 3), subsequently amended (Stats. 1990, ch. 1658, § 8).)

The record reveals that certain persons

residing in a portion of that unincorporated area of Los Angeles County which is adjacent to both the cities of Pasadena and San Marino (the Greenwood Addition) petitioned for a change of school district boundaries. In effect, they wished to secede from Pasadena Unified School District which had served that area for more than half a century and join San Marino Unified School District. Substantially the same group also filed a petition with the local agency formation commission for annexation of the area to the City of San Marino.

Pasadena opposed the reorganization petition, primarily on the ground the a racial imbalance in its schools would be worsened by such a transfer, and the approval would create a precedent that would undermine its long-standing efforts, previously court mandated, to maintain an integrated student body.

The Los Angeles County Committee on School District Organization (the County Committee) held public hearings in both affected districts

and received data regarding the proposed action.

The 21.5-acre Greenwood Addition contained approximately 71 homes, and 126 voters. It had a combined total of forty-seven school-aged children, of whom approximately 70 percent were White, one Asian, currently attended private schools. However, presumably many of these children would attend public school if the desired transfer were accomplished.

Pasadena Unified School District's student body included approximately 21,600 students, of whom approximately 39 percent were Black, 35 percent Hispanic, 21 percent White, and 5 percent Asian and others. Over the past 20 years its percentage o White students had steadily declined. The federal district court's continuing jurisdiction over Pasadena Unified School District's desegregation efforts was relinquished in 1979. (See Spangler v. Pasadena City Bd. of Ed. (9th Cir. 1979) 611 F.2D 1239.) Its voters numbered 109,000.

Of the approximately 2,700 students enrolled in the San Marino Unified School District 57 percent were White, 39 percent Asian, 3 percent Hispanic, and 1 percent Black and other. The district, which encompassed 12,812 voters, had experienced a consistent decline in enrollment over the preceding 10 years that had resulted in budgetary shortfalls.

On November 1, 1989, the County Committee voted not to recommend the approval of the petition to respondent State Board, reasoning that although the petition appeared to meet the relevant criteria, there was no compelling reason to approve the transfer of such a small number of students, particularly when the area might soon be annexed to the City of San Marino.[1] Further, the committee recommended

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[1]Pasadena Unified School District represented during the reorganization proceeding that it would not oppose the transfer were the annexation petition approved by San Marino.

that if an election became necessary, it should be held within the boundaries of both the Pasadena and San Marino Unified School Districts.

The petition came before the State board with the County Committee's recommendation of denial. In addition to that presented to the County Committee, the State Board received evidence that the transfer would increase the value of the homes within the Greenwood Addition. The estimates ranged from 10 percent to 40 percent of market value.

On June 7, 1990, the administrative committee of the State Board recommended approval of the petition by a vote of three to two, with three to one favoring limiting the election exclusively to the area proposed to be transferred. However, when the full State Board convened on June 8, 1990, one of the members of the administrative committee announced that she had originally voted in favor of approving the petition, but no longer

supported it. The State Board members unanimously voted to deny the petition.

Subsequently, on September 13, 1990, the administrative committee received additional evidence regarding the cost of the election, the decision of the then members of San Marino's School District to support the transfer, and the progress toward annexation of the area by San marino. They then voted to rehear the petition, which they recommended be approved. The State Board on the following day adopted that recommendation and, indeed, determined to restrict voting the election to decide the issue to only those voters residing in the Greenwood Addition, i.e., the very are requesting the transfer.

Although the City of San Marino rejected Greenwood Addition's petition for annexation, its school district ultimately determined to adopt a neutral position on this particular transfer. Of course, whether is willingness to be disenfranchised would have been the same,

had the ethnic and economic composition of the group seeking admission been different, is unknown.[2]

On March 1, 1991, appellant filed with this court a petition for writ of supersedeas requesting that we enjoin the election regarding transfer that had been fully prepared and was scheduled to be held only four days later on March 5, 1991. Although the result of that election appeared manifest, in accordance with customary judicial practice, we denied this 12th hour petition and, as anticipated, Greenwood Addition's request to transfer was approved by the Greenwood Addition's voters.

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[2]We were advised at oral argument that subsequent to the instant proceeding the voters of San Marino had elected new school district officers, allegedly, in part at least, because of this decision by its former officials. Consequently, San Marino may now wish to be included in the new election which will be required the board determines to proceed with this transfer following our decision.

(1) RESPONDENT DID NOT ABUSE ITS DISCRETION IN GRANTING A REHEARING

The State Board's interpretation of its own regulations[3] should be given great weight. Moreover, we interpret rules regarding rehearings broadly to encourage the correction of decisions reached on the basis of mistaken facts. Here, additional evidence was presented and the State Board properly could, as it did, grant the petition for rehearing.

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[3]Title 5, California Code of Regulation, section 18572, provides: "If the same or an essentially identical proposal or petition has been previously considered by the Board, the documents constituting such a resubmission shall be accompanies by a written summary of any new factual situations or facts not previously presented. In this case, the Board will entertain arguments not theretofore presented and hear expositions of new factual situations and of facts not previously brought to the Board's attention."

IT CANNOT BE SAID AS A MATTER OF LAW THAT THE STATE BOARD ABUSED ITS DISCRETION BY APPROVING THE TERRITORY TRANSFER PROPOSAL

Appellant contends the State Board erred in two respects: (1) in determining that the transfer would not "promote racial or ethnic discrimination or segregation" (Ed. Code § 35753, subd. (a)(4), Stats. 1980, ch. 1192), and (2) in failing to reject the proposal on the ground of a guideline prohibiting reorganizations which would cause significant increases in property value resulting in financial advantage to homeowners.

PROMOTION OF RACIAL SEGREGATION

(2) Our Supreme Court has stated that the statutory language "imposes on the State Board a more stringent obligation than its constitutional duty - a duty which would exist in the absence of section 4200 [now section 35753, subdivisions (a)(4)] - not to approve the creation of district with segregated schools. . . ." (Fullerton Joint Union High

School Dist. v. State Bd. of Education (19832) 32 Cal.3d 779, 792 (187 Cal.Rptr. 398, 654 P.2d 168].) Moreover, "[t]he State Board should also inquire into the effect of a secession Plan upon the ability of both the new district and the remaining portion of the original district to adapt to the present and anticipated racial and ethnic composition of its students, and to implement voluntary integration programs [citations]." (Id. at p. 793.)

(3) Here the proposed reorganization would carve out a small enclave which is 70 percent White from a predominantly minority district which has struggled for years with the problems of segregation, and transfer it to a largely White and affluent district. While we do not impugn the motives of those seeking to transfer, such action obviously promotes segregation, albeit of only a limited amount. (see Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]: "A racial imbalance may be

created or intensified in a particular school not only by requiring Negroes to attend it but also by providing different schools for white students who, because of proximity or convenience, would be required to attend it if boundaries were fixed on a nonracial basis." And see United States v. Scotland Neck Bd. of Educ. (1972 407 U.S. 484 [33 L.Ed.2d 75, 92 S.Ct. 2214]; Wright v. Council of City of Emporia (1972) 407 U.S. 451 [33 L.Ed.2d 51, 92 S.Ct.2196].)

The State Board, however, apparently concluded this effect would not be substantial because transferring the few potential students in the Greenwood Addition would have no detectable statistical impact on the total racial/ethnic composition of either school district. While we do not agree with that view of a transfer which might provide a blueprint for the flight of other predominately White neighborhoods, neither are we able to say the decision was necessarily arbitrary, capricious,

or without evidentiary support.

Although there are obvious factual differences, in certain respects this case is similar to Fullerton Joint Union High School Dist. v State Bd. of Educ., supra, 32 Cal.3d 779, in that it involves the requested secession of a small White enclave. That is, as our Supreme Court noted, the removal of a portion of the Fullerton district to form the Yorba Linda Unified School District might, in the future, make more difficult each district's adaptation to changing racial and ethnic populations. Nevertheless, the court refused to reverse the State Board on this issue because there was no evidence the reorganization itself would result in segregated schools: ". . . if we look to the present composition of the districts and dismiss future changes as speculative, we would not classify the State Boards's decision as arbitrary or capricious. . . ." (Id. at p. 794.)

However, what was merely a spectre haunting Yorba Linda and Fullerton's futures, is an existing plight which Pasadena has long endured. Nonetheless, if the residents of both the affected districts were to concur in the present proposed reorganization we would be reluctant to characterize the State Board's decision to recommend its implementation as arbitrary since it would not, per se, result in a significant change in the racial composition of either district.

FINANCIAL ADVANTAGE TO HOMEOWNERS

(4) Although its staff report does discuss the factor, noting that the transfer would result in significant financial gain in the transfer area, the State Board did not expressly address the issue of financial enrichment.

The proposed guideline to section 35753 of the Education Code, upon which Pasadena Unified School District relies, provides as follows: "(8) The proposed reorganization will not

result in a significant increase in property values causing financial advantage to property owners because territory was transferred from one school district to an adjoining district.: However, that proposal was not formally adopted. Similar language was subsequently codified in section 35753, subdivision (a)(8) of the Education Code, but that provision did not become effective until January 1, 1991, three months after the State Board decision.[4]

Even were we to assume the State Board should be held to a proposed guideline that had not been formally adopted (see Armisted v. State Personnel Board (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr 1, 583 P.2d 744]; Ligon v. State Personnel Bd. (1981) 123 Cal.App.3d 583, 588 [176 Cal.Rptr. 717]), Pasadena Unified

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[4]Subdivision (a)(8) provides: "The proposed reorganization is not primarily designed to result in a significant increase in property values causing financial advantage to property owners because territory was transferred from one school district to an adjoining district."

School District still has not shown the State Board acted arbitrarily, capriciously, or without evidentiary support. Contrary to earlier predictions, real party in interest presented evidence that the increase in property value would be at most 10 percent to 15 percent and that other reasons were of equal or greater force in motivating the transfer proposal. Therefore, the State Board could have concluded that the acknowledged financial advantage to property owners was not sufficiently significant to bar the transfer.

On this issue we would not substitute our judgment for that of the State Board, which has authority to make such determinations, after it has struggled with competing educational considerations throughout a lengthy administrative proceeding.

LIMITATION OF THE ELECTIONS TO THE VOTERS IN THE AREA PROPOSED FOR TRANSFER VIOLATES EQUAL PROTECTION GUARANTEES

The threshold question in reviewing the

State Board's voting area decision determines the applicable level of judicial review. (5) Our Supreme Court and the United States Supreme Court apply a two-level test.

In the typical equal protection setting the classification need only bear a rational relationship to a conceivable legitimate state purpose. However, in cases involving suspect classification or touching on a "fundamental interest," the classification must be subjected to strict scrutiny. (Fullerton Joint Union High School Dist. v. State Bd. of Educ., supra, 32 Cal.3d at p. 799.) (6) "[T]he strict standard of review has long been held to apply to voting legislation which excludes certain potential voters from participation. . . .'[a]lthough not every classification create. . .is subject to strict scrutiny, the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process.' [Citations.] For a

legislative classification relating to the elective process to avoid the strict scrutiny test of equal protection, it must have 'only minimal, if any, effect on the fundamental right to vote.' [Citation.]" (Hawn v. County of Ventura (1977) 73 Cal.App.3d 1009, 1019-1020 (141 Cal.Rptr. 111].)

(7) School district elections do not fall within the exception to the requirement for strict scrutiny for elections involving a special district of limited powers whose activities disproportionately affect members of a particular group. (Fullerton Joint Union High School Dist. v. State Bd. of Education, supra, 32 Cal.3d at p.805.) Though in some instances geographic restrictions on the franchise are not subject to strict scrutiny (see Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60 [58 L.Ed.2d 292, 99 S.Ct. 383]), our Supreme Court has interpreted that principle to apply only where geographical distinctions coincide with the boundaries of the governmental entity

concerned, and exclude no one residing within those boundaries. (Fullerton Joint Union High School Dist. v. State Bd. of Education, supra, 32 Cal.3d at p.803.)

Here, although the State Board proposed to split the Pasadena Unified School District, an existing entity with legal authority over public education within its boundaries, the right to vote this proposal was denied to all its residents except those living in the Greenwood Additions. We therefore conclude the decision of the State Board is subject to strict judicial scrutiny, and cannot be sustained unless justified by a compelling state interest.

(8) Respondents take the position that a compelling state interest is presented by the relative size of the voting groups. Tacitly acknowledging that the outcome of the election was foreordained when restricted only to those who proposed the issue, they nevertheless contend the substantial interests of the

Greenwood Addition voters in achieving their goal might be larger entity. They urge this greater electorate should not be granted a potential veto over matters which only tangentially affect them. We cannot agree. Although the state may be justified in excluding uninterested voters in order to protect the interests of persons vitally concerned (see Citizens Against Forced Annexation v. Local Agency Formation Com. (1982) 32 Cal.3d 816, 825 [187 Cal.Rptr. 423, 654 P.2d 193]), this is not such an instance.

With commendable candor, Pasadena Unified School District appropriately acknowledges that the instant secession, per se, would represent no significant financial impacts and it unlikely the loss of the small number of students directly involved would have a substantial effect upon either curriculum or facilities. Nevertheless, the racial impact upon the whole would be significant; immediately upon morale, and in the future when

this reorganization would serve as a model against the acute social problems of its predominantly minority district. Today segregation is more apt to occur in nibbles than gulps.

It is true that least some of the Greenwood Addition residents would be more sharply affected at the outset, since those with children would be able to enroll them in the public schools in San Marino Unified School District. However, the other residents of Pasadena Unified School District concerned with their public schools might feel the loss of that territory and the undermining of historic efforts to integrate the district more strongly than do the residents of the Greenwood Addition who have no school-aged children or whose children would continue to attend private schools.

We so not doubt that the interests of the residents of the Greenwood Addition and those of the Pasadena and San Marino Unified School

Districts coincide to the extent that they all desire the greatest possible educational opportunities for their children. That they may take opposing positions regarding the transfer does not mean that any group of voters is merely selfish or disinterested, but only that different interests are at stake. The fact Pasadena Unified School District's includes a desire to retain a declining White student base in not a reason to disenfranchise its citizenry. Consequently, we find the holding of the court in Fullerton Joint Union High School Dist. v. State Bd. of Education, supra, 32 Cal.3d at page 806, equally apposite here:

"In sum, we do not view the clas[s]ification at issue here as one which separates interested and uninterested voters, but one which divides two groups, each with a substantial although different interest in the election. In such a case the state has no compelling interest to grant the franchise to

one group and deny it to the other. We therefore conclude that the decision of the State Board, to the extent that it excluded [pasadena Unified School District] residents from voting at the election to approve the proposed secession of [the Greenwood Addition] form the [Pasadena Unified School District], denied such residents the equal protection of the laws."

The judgment of the superior court is reversed and the cause remanded with directions to modify the judgment in conformity with the views expressed herein. Since the modified judgment will afford Pasadena Unified School District substantially the relief it seeks, it shall recover its costs on appeal.

Nott, J., and Hart, J.,[5] concurred.

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[5]Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council